

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

PHILADELPHIA INDEMNITY INSURANCE COMPANY,)	
)	
Plaintiff)	Case No. 09-cv-07063
)	
v.)	Judge: Hon. Matthew Kennelly
)	
CHICAGO TITLE INSURANCE COMPANY and WESTERN CAPITAL PARTNERS, LLC.,)	Magistrate: Hon. Jeffrey Cole
)	
Defendants)	
)	
)	
)	

**CHICAGO TITLE’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO
DISMISS COUNT IV OF WESTERN CAPITAL PARTNERS LLC’S
CROSS-CLAIM AGAINST CHICAGO TITLE INSURANCE COMPANY**

Count IV of Western Capital Partners LLC’s cross claim against Chicago Title Insurance Company purports to state a claim for breach of fiduciary duty against Chicago Title. [Doc. 31 ¶¶ 52-55] The law in Illinois is clear that an insurer owes no fiduciary duty to its insured. Accordingly, this count should be dismissed.

STANDARD OF REVIEW

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(6) whenever a plaintiff can prove no set of facts under which he would be entitled to relief. *E.g., Mescall v. Burrus*, 603 F.2d 1266, 1269 (7th Cir. 1979). The court must accept all well-pled facts as true and must similarly resolve all reasonable inferences in favor of the plaintiff. *Id.* However, the Court is not required to accept legal conclusions either pled or implied from the pleaded facts. *Id.*

ARGUMENT

The relationship between Chicago Title and Western Capital was that of insurer and

insured. Western Capital has not alleged any other sort of relationship. The law in Illinois could not be more clear. “[I]n Illinois there is no fiduciary relationship between an insurance company and an insured.” *Overbey v. Illinois Farmers Ins. Co.*, 170 Ill. App. 3d 594, 605 (2d Dist. 1988), citing *Robacki v. Allstate Ins. Co.*, 127 Ill. App. 3d 294, 297 (1st Dist. 1984); see *Nepomonceno v. Knights of Columbus*, No. 96 C 4789, 1999 WL 66570, *10 (Feb 8, 1999, N.D. Ill) (Anderson, J.) (“Illinois courts explicitly have held that ‘there is no fiduciary relationship between an insurance company and an insured.’”) quoting *Overbey*, 170 Ill. App. 3d at 605. There is simply no law to support the notion that Chicago Title owed a fiduciary duty to Western Capital.

In order to state a claim for breach of fiduciary duty, a plaintiff must first allege that a fiduciary relationship exists. See *Sterling Federal Bank, F.S.B. v. Credit Suisse First Boston Corp.*, No. 07-C-2922, 2008 WL 4924926, *15 (Nov. 14, 2008, N.D. Ill.) (dismissing cause of action for breach of fiduciary duty for failure to plead a fiduciary duty exists). A fiduciary duty may exist, either as a matter of law, or by virtue of some special circumstances. See *Gonzalez v. American Exp. Credit Corp.*, 315 Ill. App. 3d 199, 210-211 (1st Dist. 2000). As set forth above, there is no legal fiduciary relationship between Chicago Title and Western Capital. Accordingly, the burden lays with Western Capital to establish “by clear and convincing evidence” that such a special relationship exists. *Id.* (affirming dismissal of complaint which made no such specific allegations). Accordingly, it is impossible for Western Capital to ever prevail on a cause of action for breach of fiduciary duty – where it cannot even show that such a duty existed at all.

CONCLUSION

As a matter of Illinois law, an insurer does not owe a fiduciary duty to its insured. Accordingly, Western Capital’s bare assertion that such duty existed must be ignored. Western

Capital has alleged no other facts to even intimate such a duty exists. Accordingly, it can never prevail on its claim for breach of fiduciary duty, and this Count should be dismissed.

CHICAGO TITLE INSURANCE COMPANY

March 15, 2010

By: /s/ Thomas F. Geselbracht
One of Its Attorneys

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COMPANY,)**

Plaintiff,)

v.)

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Defendants.)

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PLEASE TAKE NOTICE that, on March 15, 2010, I caused the foregoing CHICAGO TITLE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS COUNT IV OF WESTERN CAPITAL PARTNERS LLC'S CROSS-CLAIM AGAINST CHICAGO TITLE INSURANCE COMPANY to be filed electronically with the Clerk of the United States District Court for the Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois. Notice of this filing will be sent by operation of the Court's electronic filing system to the ECF registered parties indicated above. Parties may access this filing through the Court's CM/ECF system.

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